

NOV 30 1979

MICHAEL ROSAK, JR., CLERK

No. 79-681

In the Supreme Court of the United States

OCTOBER TERM, 1979

**ROSE SHUFFMAN, EXECUTRIX OF THE ESTATE
OF OSCAR SHUFFMAN, PETITIONER**

v.

HARTFORD TEXTILE CORPORATION, ET AL.

**ON MOTION FOR LEAVE TO FILE PETITION
FOR A WRIT OF MANDAMUS**

**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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**MEMORANDUM FOR THE
FEDERAL RESPONDENTS IN OPPOSITION**

Stripped of its excess verbiage and irrelevant allegations of official misconduct, petitioner's motion for leave to file a petition for a writ of mandamus seeks only an order from this Court requiring the United States Court of Appeals for the Second Circuit to provide petitioner, pursuant to Rule 0.23 of the court of appeals' rules, with a copy of the transcript of the oral argument held in petitioner's case on May 9, 1978. We wish to inform the Court that on November 8, 1979, the court of appeals granted petitioner's motion for a copy of the transcript.* Petitioner's request for issuance of an extraordinary writ by this Court is therefore moot.

*A copy of the order granting the motion, and a transcript of the oral argument held on May 9, 1978, are attached hereto.

It is therefore respectfully submitted that the motion for leave to file a petition for a writ of mandamus should be denied.

WADE H. McCREE, JR.
Solicitor General

NOVEMBER 1979

DOJ-1979-11

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PRESENT:

Hon. Sterry R. Waterman
Hon. Joe McD. Ingraham
Hon. Walter R. Mansfield,
Circuit Judges

No. 78-5024

**IN THE MATTER OF HARTFORD TEXTILE,
CORPORATION, OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC., DEBTORS**

**ROSE SHUFFMAN, AS EXECUTRIX OF THE
ESTATE OF OSCAR SHUFFMAN, APPELLANT**

v.

**HARTFORD TEXTILE CORPORATION, OXFORD
CHEMICALS, INC., AND WELLINGTON PRINT
WORKS, INC., APPELLEE**

A motion having been made herein by appellant pro se for transcription of the oral argument held on May 9, 1978 on his motion to mandate jurisdiction back to the district court,

Upon consideration thereof, it is hereby
Ordered that said motion be and it hereby is granted.

/s/ A. DANIEL FUSARO

A. DANIEL FUSARO
Clerk

Filed: Nov. 8, 1979

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 78-5024

IN THE MATTER OF HARTFORD TEXTILE
CORPORATION, OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC., DEBTORS

ROSE SHUFFMAN, AS EXECUTRIX OF THE
ESTATE OF OSCAR SHUFFMAN, APPELLANT

v.

HARTFORD TEXTILE CORPORATION, OXFORD
CHEMICALS, INC., AND WELLINGTON PRINT
WORKS, INC., APPELLEE

Before:

HON. STERRY R. WATERMAN,
JOE McD. INGRAHAM*, and WALTER R. MANSFIELD,
Circuit Judges.

New York, May 9, 1979

TRANSCRIPTION OF ORAL ARGUMENT ON
MAY 9, 1978 OF THE MOTION TO MANDATE
JURISDICTION BACK TO DISTRICT COURT

SHUFFMAN:

Thank you, your Honor. May it please the Court,
my name is David Shuffman. I am the attorney for
the appellant.

*Honorable Joe McD. Ingraham, United States Circuit Judge,
Fifth Circuit, Houston, Texas, sitting by designation.

MANSFIELD:

I think one thing ought to be made clear at the outset, Mr. Shuffman. You wrote a letter asking for a certain amount of time for argument. Our practice in this court is to read the papers before the motion is heard. We have read the papers. It is unnecessary for you to go into detail in the factual evidence or whatever you want to say because we are familiar with it. I say that because you asked for a half hour to argue your motion and ten minutes for reply or indicated that is what you plan to take. We do not allow that much time on this kind of motion. So with that in mind go right ahead.

SHUFFMAN:

Certainly, Sir, if I may have some indication of the time I can plan my argument accordingly.

MANSFIELD:

Will you raise the lectern over there, please. I would say just about five to eight minutes would be sufficient for this motion.

SHUFFMAN:

Fine, Sir. Thank you. Your Honor, we have made a motion for an order mandating jurisdiction back to the United States District Court to the Honorable Charles L. Brieant to allow him to rule on a motion to reargue his Memorandum and Order dated February 22, 1978. The notice of appeal to this honorable court was filed on March 23, 1978, approximately the last date for the filing of the notice of appeal. The Honorable Judge Brieant did hear reargument on March 28, 1978 and with the full knowledge that the notice of appeal had been filed in

this court did in fact grant reargument. However, because the Honorable Judge Brieant did not specifically state that he was granting reargument, we were forced to then docket the appeal in this court.

MANSFIELD:

Well, let me ask you, was some action taken later on April 17th?

SHUFFMAN:

Yes Sir, there was.

MANSFIELD:

What was that action?

SHUFFMAN:

That was another order by the Honorable Charles L. Brieant vacating as improvidently granted his decision to grant reargument because of the docketing of the appeal in this honorable court. However, . . .

MANSFIELD:

If Judge Brieant has vacated his earlier order as improvidently granted, then what is there to remand?

SHUFFMAN:

Your Honor, I believe that Judge Brieant was in error when he entered that April 17th order. Under the holding of *Lloyd v. Lawrence*, 60 Federal Rules Decisions 116, the honorable district court judge can take no action after an appeal has been docketed except that action which will aid in the appeal or in fact correct clerical errors. Judge Brieant's decision specifically said that he was vacating his original

order granting reargument without prejudice to that action to be taken by the parties in the United States Court of Appeals. I had hoped that that action would be a stipulation mandating jurisdiction back to the district court on the basis of the fact that Judge Brieant did in fact acknowledge his errors in his earlier order and under the rules of bankruptcy and under the Bankruptcy Act the United States Court of Appeals should not be the court of first instance to decide a bankruptcy appeal. Under the holding of *Wayne United Gas Co. v. Owens Illinois Glass* and the other cases cited by my adversary most notably this Court's decision in *Braniff Airways v. Curtis Wright*, this Court should not in fact be the first court to decide a bankruptcy appeal, especially when the district court judge. . .

MANSFIELD:

When you say the first court to decide a bankruptcy appeal as I understand it by decision entered sometime in February, Judge Brieant affirmed the order of the bankruptcy judge which reduced your client's claim.

SHUFFMAN:

Yes, Sir but. . .

MANSFIELD:

Then how are we being called in to act as the court of appeal from the bankruptcy judge?

SHUFFMAN:

Because that order has, in fact, been vacated by his subsequent order granting reargument and by his acknowledgement in so doing that he in fact erred in reaching that memorandum and order. Based upon

the fact that the attorneys Weil, Gotshal & Manges have in fact deliberately falsified their oral argument in the court below.

MANSFIELD:

Is there anything in the record that shows that that order is not in effect?

SHUFFMAN:

Only the fact that once an appeal is taken to this honorable court. . .

WATERMAN:

But you have control of it, which I don't understand. Why don't you withdraw your own appeal and get it over with.

SHUFFMAN:

This is the procedural problem we find ourselves in, your Honor. If we were to withdraw the appeal as you have stated, District Judge Brieant has now vacated his order granting reargument. We would be glad to have Judge Brieant correct his errors which he has acknowledged he has made. But apparently the attorneys for the appellees do not want to go back to Judge Brieant knowing full well what they have done in his courtroom and what they have done in the bankruptcy court.

WATERMAN:

They will not let you withdraw your appeal.

SHUFFMAN:

Your Honor, they had at first indicated that they would consider the fact that this case should go back to Judge Brieant on stipulation.

WATERMAN:

I don't understand it. I would like to ask you. Why won't you permit him to withdraw his appeal?

MITTMAN:

We are not opposed to his withdrawing his appeal. He won't withdraw his appeal. Your Honor under the decision of the Braniff Airline case, District Judge Brieant has the jurisdiction at all times to consider whether or not he will consider a motion for a rehearing. There is nowhere in any of the transcripts of any of the hearings before Judge Brieant which indicate. . .

WATERMAN:

So you are telling us in open court insofar as you are concerned Judge Brieant may continue below.

MITTMAN:

Exactly that your Honor.

WATERMAN:

An an officer of this court. . . now doesn't that satisfy you?

SHUFFMAN:

Your Honor, unless Judge Brieant so acknowledges his order of April 17th seems to put a damper on that particular prospect. We would be most happy to. . .

MANSFIELD:

Does not his order of April 17th Mr. Shuffman, simply indicate that he does not think there is any merit to your request for rehearing and he stands by his original order.

SHUFFMAN:

Your Honor, I do not read that in the Honorable Judge's decision especially in view of the fact that. . .

MANSFIELD:

I think we have your position fairly clear. Is there anything you want to add.

SHUFFMAN:

Your Honor, I would be glad to stipulate on the record to send this case back to Judge Brieant to allow him to rule on the motion to reargue which he had granted and after he has indicated that his original decision was in error in numerous respects.

WATERMAN:

Well, then you don't need a stipulation at this time but if you can get your adversaries to stipulate you can go back in front of him (—inaudible). . .

SHUFFMAN:

I yield to the attorneys for the appellees.

Your Honor, . . .

MANSFIELD:

I don't think it's going to be necessary to hear the opposition here. Mr. Zirinsky, it is?

MITTMAN:

No, my name is Mr. Mittman, your Honor. Just one thing, if I may. . . Your Honor, this case has been around since 1974. Numerous charges of impropriety have been made both against my firm, against my colleague, Bruce Zirinsky, against Bankruptcy Judge Babbitt, against the U.S. Attorney, Mr. Fiske.

Bankruptcy Judge Babbit, in a 15-page decision back on June 1, 1977, decided a simple contract action. Judge Brieant, in his opinion, most recently affirmed the decision of Bankruptcy Judge Babbit holding that none of Bankruptcy Judge Babbit's findings of fact or conclusions of law were erroneous in any respect. As a matter of course, Mr. Shuffman made a motion to reargue before District Judge Brieant.

MANSFIELD:

I don't think you need to review—did you hear what I said to Mr. Shuffman earlier? We've read all that.

MITTMAN:

I understand, your Honor. It's just that briefing has been completed in the district court and we're prepared to argue a simple contract action before this court. That's all I have to say, your Honor.

MANSFIELD:

Well, I think we can dispose of this right now. We are going to deny the motion without prejudice to your applying, if you wish, to Judge Brieant, for such relief as you seek with reference to reconsideration of the motion.

SHUFFMAN:

Your Honor, if I may, just for one moment be heard. . .

MANSFIELD:

I think, when you say one moment. . .

SHUFFMAN:

Just one moment.

MANSFIELD:

All right.

SHUFFMAN:

Thank you, Sir. Your Honor, by reapplying to Judge Brieant are you... I'm a bit perplexed here. We too have gone to considerable time and expense in preparing an ap...

MANSFIELD:

If you want the right to go back and try to get him to reconsider, that's what...

SHUFFMAN:

He has already said that he has reconsidered. Under the holdings he cannot now vacate.

MANSFIELD:

Well—if he has reconsidered, then we deny the motion without having...

WATERMAN:

With prejudice.

MANSFIELD:

... there's no necessity for the qualification. The motion is denied.

SHUFFMAN:

Your Honor, in which case this case should be in fact directed back to Judge Brieant and he should be ordered...

MANSFIELD:

Now, Mr. Shuffman, we've ruled. Denied.

SHUFFMAN:

Your Honor, I understand that, May I ask the Court for stay of the further proceedings in this Court on this appeal, then? Until Judge Brieant has a chance to rule and make a final order. What will happen to our time to appeal?

WATERMAN:

I don't think that's a bit necessary.

MANSFIELD:

Denied.

SHUFFMAN:

Your Honor, may I ask then that the time to appeal from Judge Brieant's decision on the order either granting or denying reargument now be extended until 10 days after he enters the order granting a re...

MANSFIELD:

You may proceed in accordance with the Federal Rules of Appellate procedure as amplified by the rules of this Court.

SHUFFMAN:

Your Honor, I thank you.

MANSFIELD:

That does not grant what you have just requested. It restricts you to those rules.

SHUFFMAN:

Yes Sir.

* * * * *